Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1995

MARY D. SMITH,

*Petitioner,*

vs.

GLENOLDEN BOROUGH, THE BOROUGH COUNCIL OF GLENOLDEN BOROUGH, GEORGE E. HASSEL, DENISE McCARTHY, SARAH A. DOUGHERTY, JOSEPH SELFRIDGE, THEODORE BATHURST, KAREN CARLUCCI, FRANCIS O'NEILL, ALBERT KELLEY, WILLIAM REESE, EDWARD G. ROTH, III, RUSSELL H. DECKER, and JAMES BAILEY, BOROUGH BUILDING INSPECTOR,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Glenolden Borough Code violates a residential tenant's fundamental right to privacy and right to be free from unreasonable searches under the Fourth Amendment when the municipality can demand immediate, non-consensual and warrantless entry into the home under threat of immediate criminal prosecution.

2. Whether the annual municipal wide inspection of all rented homes, and not similarly situated owner occupied homes, is not rationally related to any reasonable legislative purpose or administrative standard because it creates an impermissible second class of "person" under the Fourth Amendment.

3. Whether the Court of Appeals committed error when it found probable cause for issuance of an administrative search warrant to enter Petitioner's home exclusively on the "statutory purpose" of the inspection provision in the code.

4. Whether Glenolden Borough violated the Petitioner's fundamental right to Procedural Due Process of the Law and right to Privacy when it criminally prosecuted her for refusing to consent to a warrantless search of her home.

## PARTIES TO THE ACTION

All parties in the courts below are listed in the caption in this Court. Pursuant to Rule 29.1 of this Court, Petitioner has no parent company nor any non-wholly owned subsidiary.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

PARTIES TO THE ACTION ..... ii

TABLE OF AUTHORITIES ..... iv

OPINIONS AND ORDERS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

STATEMENT OF JURISDICTION IN COURT OF FIRST INSTANCE ..... 7

REASONS FOR GRANTING WRIT ..... 8

CONCLUSION ..... 30

APPENDIX

Memorandum Opinion of the Third Circuit Court Of Appeals ..... A1

Judgment of the Third Circuit Court Of Appeals ..... A8

Judgment of the Third Circuit Court of Appeals denying Rehearing ..... A10

Order of the U.S. District Court for the Eastern District of Pennsylvania ..... A12

Memorandum Opinion of the U.S. District Court for the Eastern District of Pennsylvania ..... A14

Glenolden Borough Code, Section 93-9 ..... A33

## TABLE OF AUTHORITIES

Page

FEDERAL CASES

*Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) ..... *passim*

*Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1962) ..... 10, 18

*City of Kalamazoo v. Jerry Speedy*, No. C94-4552, C94-4553 (Ninth Jud. Dist., Kalamazoo County, Sept. 25, 1995) ..... 17

*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) ..... *passim*

*Payton v. New York*, 445 U.S. 573 (1980) ..... 11, 24

*Pratt v. Chicago Housing Authority*, 848 F. Supp. 792 (N.D. Ill. 1994) ..... 16

*U.S. v. Acosta*, 965 F.2d 1248 (3d Cir. 1992) ..... 21

*United States v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993) ..... 11

*United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) ..... 11

FEDERAL CONSTITUTION

U.S. Const. Amend. IV ..... *passim*

U.S. Const. Amend. V ..... 2, 29

U.S. Const. Amend. XIV ..... 2, 29

STATE STATUTES

Pennsylvania Rule of Criminal Procedure

(1) Rule 313 ..... 28, 29

(2) Rule 314 ..... 28, 29

## PETITION FOR WRIT OF CERTIORARI

Mary D. Smith hereby petitions this Court for a writ of certiorari to review the judgment of the Third Circuit Court of Appeals which conflicts with this Court's decisions in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) and *Camara v. Municipal Court*, 387 U.S. 523 (1967).

## OPINIONS AND ORDERS BELOW

1. The Third Circuit Court of Appeals memorandum opinion and judgment, No. 94-2247, dated October 30, 1995, is non-published and is reproduced in the Appendix.

2. The Third Circuit Court of Appeals order dated December 5, 1995, denying Petition for Rehearing en banc and Rehearing by Panel is non-published and is reproduced in the Appendix.

3. The District Court opinion and judgement, No. 94-3819 dated November 30, 1994, is non-published and is reproduced in the Appendix.

## JURISDICTION

The judgment of the Third Circuit Court of Appeals was filed on October 30, 1995. The Petition for Rehearing before the Third Circuit Court of Appeals was denied by Order dated December 5, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. SECTION 93-9 9(C) OF THE GLENOLDEN BOROUGH ORDINANCE:

> Inspection and access to dwellings. The Housing Officer or his agents are hereby authorized and directed to make inspections of the conditions of rental dwellings, multiple dwelling units, rooming units and other structures located in the Borough of Glenolden. Upon display of proper identification, the inspector is authorized to enter, examine and survey such units and premises on weekdays between 9:00 a.m. and 4:00 p.m. (emphasis added).

The remaining text of Section 93-3 of the Glenolden Borough Code is reproduced in the Appendix at A-33.

B. FOURTH AMENDMENT TO UNITED STATES CONSTITUTION:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

C. FIFTH AMENDMENT TO UNITED STATES CONSTITUTION:

> . . . nor be deprived of life, liberty, or property, without due process of law . . .

D. FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION:

> . . . nor shall any State deprive any person of life liberty, or property, without due process of law; . . .

## STATEMENT OF THE CASE

The Petitioner, Mary D. Smith ("Ms. Smith"), lives in Glenolden Borough, a suburban community in the western suburbs of Philadelphia. Her home is a small one-bedroom apartment in a multi-family building. Ms. Smith has occupied her home quietly and safely for nearly twenty four years. The last four years Glenolden Borough has decided to perform annual warrantless searches (inspections) of her home under threat of criminal conviction.

This case involves a severe and abusive violation of Ms. Smith's fundamental rights of privacy protected under the Fourth Amendment and rights to procedural due process. Within two days of Ms. Smith's visit to the Borough hall to view the Borough Code, which access was wrongfully denied her, the Borough filed criminal charges against her. Ms. Smith was convicted and fined under the provisions of the Glenolden Borough Code for refusing to permit a non-consensual, warrantless search of her home.

In conflict with this Court's decision in *Marshall v. Barlow's*, the Glenolden Borough Code requires and authorizes the annual inspection of all residential rental dwellings, without prior notice from the Borough to the dwelling occupant and without the occupant's consent or presence. The Borough Code in pertinent part provides:

> Inspection and access to dwellings. The Housing Officer or his agents are hereby authorized and directed to make inspections of the conditions of rental dwellings, multiple dwelling units, . . . **Upon display of proper identification, the inspector is authorized to enter, examine and survey such units and premises on weekdays between 9:00 a.m. and 4:00 p.m.** (emphasis added)

The residential occupant is, therefore, subject to the whim and caprice of the municipal officer who will arrive with a knock on the door and a verbal demand to enter and inspect. If a resident objects to the demand for immediate search, the Glenolden Borough Code does not contain any provision requiring the municipality to proceed to a warrant hearing before a neutral and detached magistrate. Instead, the Borough Code criminalizes the refusal to permit the municipal officer into the home.

## FACTUAL BACKGROUND

On October 8, 1993, Ms. Smith received a notice from her Landlord advising her that the inspector for Glenolden Borough demanded entry into her home on October 18, 1993, "to inspect." Ms. Smith never received any notice or statement from the Borough pertaining to the nature or scope of the inspection.

On October 12, 1993, Ms. Smith sent a letter to the President of Glenolden Borough Council. The letter informed the Borough that access to her apartment for the purpose of inspecting the same was denied until such time as she could ascertain the validity of the Borough's inspection demand. Ms. Smith further requested that the Borough provide her with a copy of the "regulation or ordinance" that describes the "**primary governmental authority and total purpose, scope, and procedures that are applicable**" to the requested inspection.

The Borough through its solicitor provided Ms. Smith with five (5) selected pages of Chapter 93 of the Borough Code and informed her that failing to permit entry into her home, she would be subject to "penalties imposed in accordance with applicable law." The criminal penalty section of the Code which provides for fines and

imprisonment was contained on one of the selected five pages. (Appendix A-39).

It becomes painfully clear that the Borough, under express authority of its ordinance, simply wanted to coerce Ms. Smith into opening her door rather than provide her with the public ordinance. In response to Ms. Smith's second written request for production of the missing portions of the Borough Code, Solicitor Tinucci refused further production of the Borough Code and stated:

> "It is my position that I have sent you everything you are entitled to . . . If you do not agree to this inspection by October 25, 1993 I will assume that we will have to take whatever action is necessary to have the inspection accomplished. I trust that further letter or court hearings will not be necessary."

Ms. Smith, still unaware of the "lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization", personally visited the Borough hall to view the Code. With hand outstretched, the Borough inspector denied Ms. Smith access to the Borough Code and referred her back to Solicitor Tinucci, the same Borough representative who on two prior occasions denied her access to a full copy of the Ordinance and had threatened her with criminal prosecution.

The Borough then retaliated against a single woman who decided to ask, "why." Within two days of Ms. Smith's visit to the Borough hall, the Borough swore out a Criminal Complaint against Ms. Smith for her failure to allow the Borough to search her home. She was then convicted and fined on December 14, 1993, after a full trial before Judge Tozer of the Glenolden Magisterial

Court. Ms. Smith appealed her criminal conviction to the Delaware County Court of Common Pleas.

The Third Circuit Panel found, "that the Borough Council improperly denied Ms. Smith access to the Code. There is no reasonable justification for such action . . . The Council's response to Smith's requests, barring her access to the law, was inappropriate." (Circuit Court Opinion, Appendix A-7).

In February 1994, the criminal conviction appeal was pending before the Court of Common Pleas and was scheduled for a hearing in March 1994. At about 9:30 a.m., on February 24, 1994, the Borough housing inspector, without prior notice to Ms. Smith, filed an ex parte application with Judge Tozer (the same judge who convicted her) for issuance of a search warrant. Immediately and without a probable cause hearing, Judge Tozer approved the ex parte warrant application on its face and issued a general criminal search warrant.

On February 24, 1994, the Glenolden inspector, escorted by two police officers, entered Ms. Smith's home against her consent pursuant to the authority of the search warrant.

In comparison, the Borough Code does not authorize or require the annual inspection of identically situated owner occupied dwellings.

Ms. Smith does not contest the municipality's interest to inspect the common areas of the multi-family building, which include hallways, mechanical room, roof, exterior and common points of ingress and egress. Ms. Smith's case begins and ends with the front door to her home.

## STATEMENT OF JURISDICTION IN COURT OF FIRST INSTANCE

### A. Original Jurisdiction – United States District Court, Eastern District of Pennsylvania.

The United States District Court, Eastern District of Pennsylvania, had jurisdiction upon the alleged federal constitutional claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(1)(2)(3) and (4), and over the claims under the Pennsylvania Constitution and laws pursuant to 28 U.S.C. § 1367(a).

The Petitioner appealed from a final judgment of the United States District Court, Eastern District of Pennsylvania, entered on November 30, 1994, denying Petitioner's Motion for Summary Judgment and granting Respondents' Motion for Summary Judgment on all of Petitioner's claims for violations of her rights protected under the United States Constitution, and dismissing without prejudice Petitioner's claims under the Constitution and laws of the Commonwealth of Pennsylvania. The Petitioner demanded relief in the form of Declaratory Judgment, 42 U.S.C. § 2201, Injunction and redress under the *Civil Rights Act*, 42 U.S.C. § 1983. The Petitioner properly appealed the judgment to the Third Circuit Court of Appeals.

### B. Appellate Jurisdiction – Court of Appeal of the Third Circuit.

The jurisdiction of the United States Court of Appeals for the Third Circuit was invoked pursuant to 28 U.S.C. § 1291 (1994).

## REASONS FOR GRANTING WRIT

### Introduction

The decision of the Third Circuit Court of Appeals to allow nonconsensual, warrantless searches of residential rental homes under threat of force conflicts with the decisions of this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) and *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

This case is the first opportunity for the United States Supreme Court to extend its decision in *Marshall v. Barlow's*, (which involved regulations that criminalize the refusal to a warrantless administrative inspection of a commercial property) to an administrative search of the residential home. In *Marshall v. Barlow's*, this Court declared OSHA inspection language, almost identical to the Glenolden Ordinance, unconstitutional on its face. The Court of Appeals improperly stated that the Glenolden Ordinance could be read in some fashion to prohibit inspections that are both non-consensual and warrantless.

Identical to the regulatory scheme found in *Marshall v. Barlow's*, nowhere in the Glenolden Ordinance is the word "warrant" mentioned; nor is there any express requirement that the municipal officer must seek a warrant when the home occupant denies consent to search. To the contrary and directly in conflict with the holding in *Marshall v. Barlow's*, the Glenolden Ordinance authorizes its housing officer to demand immediate entry into the home for an administrative search; such demand being made without prior notice from the Borough and under threat of unlawful force and immediate criminal prosecution.

The Court of Appeals found without any support in the record that the Ordinance could be read to provide for a lawful search. The effect of the Third Circuit opinion is to vest municipal officials with unbridled discretion to enter homes because they feel it is a reasonable time. The result of the decision will be to place the millions of residential apartment occupants in the Third Circuit in jeopardy of criminal sanction if they ask "why."

The Court of Appeals failed to address the issue of exceptional importance and one that should be resolved by this Court: that is, the Borough Ordinance unconstitutionally creates unreasonable classifications of "people" for purposes of Fourth Amendment protections. In this matter, a person who occupies his home under a lease derives less privacy rights under the Fourth Amendment than an identically situated home owner. The subject Ordinance cannot be determined to be rationally related to a valid legislative purpose or administrative standard because the Ordinance is drafted to permit only searches of rented homes. Such a result creates an impermissible second class of person within the definition of rights guaranteed by the Fourth Amendment.

Also, this Petition provides the Court with an opportunity to review the pervasive attempts by local municipalities throughout this country to eviscerate the fundamental right of privacy protected by the Fourth Amendment under the guise of administrative inspections for a fee to generate revenue. Under the new generation of local ordinances, probable cause is no longer the measuring stick to gain access by warrant. In conflict with this Court's decision in *Camara v. Municipal Court*, the Court of Appeals did not measure probable cause for the issuance of a search warrant against the facts of the case. To the contrary, the Court of Appeals read the

municipal ordinance and improperly found probable cause solely because the stated purpose of the ordinance "clearly protects valid public interests." That statement has never been the measure of probable cause under the Fourth Amendment and misapprehends the basis of the probable cause protection, i.e., when consent to search is denied, the municipality must articulate specific facts to support a probable cause finding for issuance of a search warrant for the particular home in question.

## I THE GLENOLDEN BOROUGH CODE VIOLATES A RESIDENTIAL TENANT'S FUNDAMENTAL RIGHT TO PRIVACY AND RIGHT TO BE FREE FROM UNREASONABLE SEARCHES UNDER THE FOURTH AMENDMENT WHEN THE MUNICIPALITY CAN DEMAND IMMEDIATE NON-CONSENSUAL AND WARRANTLESS ENTRY INTO THE HOME UNDER THREAT OF IMMEDIATE CRIMINAL PROSECUTION.

This Court is confronted with a municipal code and actions of municipal employees which offend one of the most important rights guaranteed by the Federal Constitution, the right to be secure in one's home and to be free from unreasonable searches.

The United States Constitution guarantees the fundamental right of privacy and safeguards individuals against unreasonable searches of the home. U.S. Const. Amend. IV. The guarantees of the Fourth Amendment are not limited to the home which is occupied by the owner. The occupant of a private dwelling under a lease agreement has the same reasonable expectation of privacy and security in the home guaranteed by the Fourth Amendment prohibition against unreasonable searches and seizures. *See, Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1962).

No place is more sacred under Fourth Amendment law than the home.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that at the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (citation omitted) (bracket and ellipses in original).

*Payton v. New York*, 445 U.S. 573, 589-90 (1980). Thus, "the chief evil against which the [Fourth] Amendment is directed is the physical entry of the home." *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752, ___ (1972). A warrantless search inside a home is presumptively unreasonable and therefore unconstitutional. *Payton*, 445 U.S. at 586.

Recently, this Court reaffirmed the importance of private property rights in our tradition of law by declaring that "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993). This Court is petitioned to address the national trend to expand the administrative inspection of the home at the loss of the most fundamental right to deny arbitrary warrantless access into the home under threat of criminal penalty.

## A. THE GLENOLDEN BOROUGH CODE IS UNCONSTITUTIONAL ON ITS FACE AND CONFLICTS WITH THIS COURT'S DECISION IN *MARSHALL V. BARLOW'S*

In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), this Court held that administrative searches, including inspections for health, safety and welfare purposes, "are significant intrusions upon the fundamental interest of privacy protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Camara v. Municipal Court*, 387 U.S. at 534, 87 S.Ct. at ___, 18 L.Ed.2d at 938.

Following *Camara*, this Court held that the business operator was "entitled to a declaratory judgment that the Act is unconstitutional insofar as it purports to authorize inspections without a warrant or its equivalent and to an injunction enjoining the Act's enforcement to that extent." *Marshall v. Barlow's*, 436 U.S. 307, 325, 98 S.Ct. 1816, 1827 56 L.Ed.2d 305, 319 (1978) (Supreme Court reviewed the language in Section 8(a) of the Occupational Safety and Health Act of 1970[1]).

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[1] Section 8(a) of the *Occupational and Health Act of 1970*, 84 Stat. 1598, 29 U.S.C. § 651 et seq. provided:

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized –

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable

This Court on a facial review of Section 8(a) determined "no search warrant or other process was expressly required by the Act." *Marshall v. Barlow's*, 436 U.S. at 309, 98 S.Ct. at 1827, 56 L.Ed.2d at 309. Based upon this Court's finding that no search warrant or other process was expressly required by the Act and the plain language of Section 8(a) permitting the inspector to knock and demand entry, this Court Declared that Section 8(a) of the Act was unconstitutional as a matter of law.

The Court of Appeals erred as a matter of law in not finding in favor of Ms. Smith's summary judgment motion which requested that the Glenolden Borough Ordinance be declared unconstitutional to the extent that it expressly permitted non-consensual, warrantless administrative inspections of the home. The Glenolden Borough Code operates unconstitutionally in all conceivable circumstances because it authorizes immediate entry, without prior notice, and under threat of criminal prosecution. This express authorization to make an immediate search without notice and under threat of criminal prosecution is unlawful "force" which has been held unconstitutional.[2]

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limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein. . . . .

*Barlow's*, at 310, 98 S.Ct. at ___, 56 L.Ed.2d at 309 n.1.

[2] Unlawful "force" is not limited to physical restraint. The threat of criminal prosecution or the threat of breaking the common doors to the apartment building to gain access is unlawful "force" which violates the Fourth Amendment. See, *Gouled v. U.S.*, 255 U.S. 298, 305, 306, 65 L.Ed. 647, 651, 41 S.Ct. 261 (1920) (a search would violate the Fourth Amendment if the entry were illegal whether accomplished "by force or by an illegal threat or show of force" or "obtained by stealth instead of by force or coercion.").

There is no difference between the regulatory language declared unconstitutional in *Marshall v. Barlow's* and the Glenolden Ordinance. However, the Third Circuit Panel refused to address this material fact and committed error of law.

Identical to Section 8(a) of the Act, the Glenolden Borough Code unlawfully permits the Building Inspector to knock on the door, show identification and demand immediate entry to conduct the annual inspection of an occupied home. Section 93-9(C) provides in pertinent part:

> C **Inspection and access to dwellings. The Housing Officer or his agents are hereby authorized and directed** to make inspections of the conditions of rental dwellings, multiple dwelling units, rooming units and other structures located in the Borough of Glenolden. **Upon display of proper identification, the inspector is AUTHORIZED TO ENTER, examine and survey such units and premises on weekdays between 9:00 a.m. and 4:00 p.m. . . .** (emphasis added).

In addition, this Court in *Camara v. Municipal Court* found that Section 503[3] of the San Francisco Ordinance unconstitutionally authorized the inspector to demand

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[3] The San Francisco Municipal Code provided:

"Sec. 503 RIGHT TO ENTER BUILDING. Authorized employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

immediate entry into the home to conduct warrantless searches. This Court stated:

> Finally, as this case demonstrates, refusal to permit an inspection is itself a crime, punishable by fine or even by jail sentence.
>
> Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization . . . **The practical effect of this system is to leave the occupant subject to the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.**

*Camara v. Municipal Court*, 387 U.S. at 539, 87 S.Ct. at ___, 18 L.Ed. at ___.

The Supreme Court decisions in *Camara v. Municipal Court* and *Marshall v. Barlow's* provide a clear mandate to municipalities: administrative inspection ordinances must incorporate an express restriction upon the discretion of the government by requiring a warrant proceeding, or its equivalent, when consent is refused by a home occupant. Absent the express limitation of a warrant proceeding or its equivalent, then a naked authorization to knock and inspect at reasonable times will be declared unconstitutional as a violation of the Fourth Amendment.

This Court is requested to extend its decision and Fourth Amendment protections of the commercial property in *Marshall v. Barlow's* to the residential forum and find that the Court of Appeals was in error in not Declaring the Glenolden Ordinance unconstitutional on its face.

The home is the most sacred place for Fourth Amendment purposes and should receive greater Fourth Amendment protections than a commercial property. Even the District Court, Judge Stewart Dalzell, recognized this premise when he stated that:

> "section 93-9(C) does not explicitly require the unit occupant's consent for an inspection, nor does it contemplate a warrant procedure if a unit occupant does in fact refuse consent. If we interpreted section 93-9(C) to permit warrantless searches without the occupant's consent, then it would be clearly unconstitutional under *Camara*." (Dalzell, *Memorandum Opinion*, pp.11-12, Appendix at A-25).

There could be no other interpretation. All of the facts in this matter demonstrate conclusively that Glenolden Borough officials attempt to dictate their will by the use of threats of criminal arrest and prosecution, and by threats of physical force. However, the Third Circuit Court of Appeals never tested the actual wording of the Ordinance against this Court's pronouncements and never addressed the unlawful force and coercion practiced by the Borough in severe disregard for the personal rights of Ms. Smith.

Administrative inspection ordinances and similar practices to those of Glenolden Borough are pervasive throughout the Third Circuit as well as nationally. In a recent case arising out of nonconsenual, warrantless searches of apartments in public housing, a U.S. District Court enjoined the housing authority from conducting warrantless searches of apartments "without resident consent." See *Pratt v. Chicago Housing Authority*, 848 F. Supp. 792, 797 (N.D. Ill. 1994). Similarly, a landlord was

criminally prosecuted when he refused to allow governmental inspectors into occupied apartments absent consent from the tenants. In September 1995, the judge dismissed the charges against the landlord, but the city has appealed. See *City of Kalamazoo v. Jerry Speedy*, No. C94-4552, C94-4553 (Ninth Jud. Dist., Kalamazoo County, Sept. 25, 1995.)

In 1995, several apartment occupants instituted action in the United States District Court for the Northern District of Illinois, seeking a declaration and injunction against the local municipality from requiring landlords to open the doors of apartments to perform nonconsenual [searches] administrative inspections. *Black et al. v. Village of Park Forest*, No. 95C7537 (N.D. Ill. 1995). The Plaintiffs further allege that search warrants for annual administrative searches "based solely upon the passage of time between inspections or on the mere prerogative of the building official to conduct an inspection at any reasonable time" violates the traditional protections of the Fourth Amendment.

The efforts of local municipalities to inspect (to collect fees) have relegated the Fourth Amendment right to privacy to "the status of a poor relation." The Petitioner requests this Court to accept her Petition and extend the important protections afforded to a commercial enterprise in *Marshall v. Barlow's*, to the administrative inspection of residential homes.

## II THE ANNUAL MUNICIPAL WIDE INSPECTION OF ALL RENTED HOMES, AND NOT SIMILARLY SITUATED OWNER OCCUPIED HOMES, IS ARBITRARY AND NOT RATIONALLY RELATED TO ANY REASONABLE LEGISLATIVE PURPOSE OR ADMINISTRATIVE STANDARD AND IS THEREFORE UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT.

The Court of Appeals' decision creates an impermissible classification of "people" under the Fourth Amendment. The Fourth Amendment does not segregate out "people" who occupy rented dwellings and provide the same with a lesser guarantee of privacy and security. To the contrary, the Fourth Amendment protects the personal dignity of all "people" to be secure in their "houses." This Court has so determined that the same Fourth Amendment right of privacy should be afforded to occupants of residences which are rented. *See Chapman v. United States*, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1962).

The Court of Appeals refused to address this issue of overwhelming importance. As discussed below, the ordinance should have been held unconstitutional because the ordinance failed in all respects to articulate any reasonable legislative standard why only rented homes, and not identically situated owner occupied homes, should be inspected annually.

To determine whether the municipal-wide search of rented dwellings, to the exclusion of owner occupied dwellings, is proper, this Court must determine the reasonableness of the legislative or administrative standard of the inspection program. This Court must balance the need to search against the reasonable goals of the code enforcement. *Camara v. Municipal Court*, at 536-37, 87 S.Ct. at ___, 18 L.Ed.2d at 940.

The *Camara* Court found that "there is agreement among authorities that the only effective way to seek **UNIVERSAL** compliance with the minimum building, safety and health standards is through routine, periodic inspections of **ALL** structures." (emphasis added) *Camara v. Municipal Court*, 387 U.S. at 535-36, 87 S.Ct. at ___, 18 L.Ed.2d at 939. The purpose of such inspection programs is to secure "city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety." *Camara v. Municipal Court*, 387 U.S. at 535, 87 S.Ct. at ___, 18 L.Ed.2d at 939. The Court further stated, that "the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area **AS A WHOLE**, not on its knowledge of conditions in a particular building. *Camara v. Municipal Court*, 387 U.S. at 536, 87 S.Ct. at ___, 18 L.Ed.2d at 939.

Hence, this Court in *Camara* concluded that ALL STRUCTURES, not just rented units, must be inspected to provide an effective inspection program which is reasonably related to the expressed goals to promote health and avoid safety problems by ensuring that minimum building and safety standards are maintained. Therefore, limiting inspection to rental properties, which may constitute only one-third of occupied dwellings, is not rationally related to the purpose of municipal-wide compliance with health, safety and minimum building standards.

The limitation of the inspection program to rented dwellings is clearly synthetic and not rationally related to the express purpose of the Code when confronted with the reality that rented and owner occupied dwellings coexist within the same building or structure. If you are a

tenant in the Third Circuit, you now derive less Fourth Amendment protections. The tenant has lost his or her rights to privacy in the home not because of any tangible and articulated concern for health and safety; but, rather, for the ability of the local municipality to generate an inspection fee.

The Glenolden Borough Ordinance does not contain any legislative history concerning any specific health or safety issue to be addressed. The only hint at the reason for the inspection search is found in the "Purpose" section of the Code. The "Purpose" Section of the Glenolden Borough inspection program is stated as follows:

> "This Chapter is enacted for the following purposes: to promote and protect the health, safety, morals and general welfare of the inhabitants of the Borough of Glenolden by abating overcrowded housing conditions; securing adequate lighting, heating, ventilation, access and egress; preventing or correcting unhygienic, unsanitary conditions which might constitute a menace to residents of the Borough of Glenolden."

The purpose section of the inspection ordinance does not make any legislative finding that rented dwellings constitute a greater risk of unsanitary and unsafe conditions which may constitute a menace to residents than do owner occupied dwellings. The Borough Code simply distinguishes the right to search upon the legal title possessed by the occupant. Query: should an occupant of a rented condominium unit in a large condominium building have less guarantees under the Fourth Amendment as compared to his neighbor who occupies the same type of unit, on the same floor, but so happens to own his unit?[4]

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[4] The Appellant does not maintain that she has any privacy interest in the common areas of the apartment building,

When, as here, the local Code fails to articulate any legislative or administrative determination why only rented homes should be searched, as compared to identically situated owner occupied homes, the code is not reasonable for Fourth Amendment purposes.

The prejudice against rented dwellings is usually found in the paternalistic premise that tenants are helpless to maintain their dwelling or are helpless to require landlords to maintain the dwelling resulting in unsafe and unsanitary conditions. However, this premise is substantially discounted by the reality of the free market and the emergence of powerful laws and favorable decisions by the state courts protecting tenants' rights.

## III THE COURT OF APPEALS COMMITTED ERROR WHEN IT FOUND PROBABLE CAUSE FOR ISSUANCE OF A SEARCH WARRANT TO ENTER MS. SMITH'S HOME EXCLUSIVELY ON THE "STATUTORY PURPOSE" OF THE ADMINISTRATIVE INSPECTION PROVISION IN THE CODE.

**The *Camara* decision only temporarily checked the national trend of municipalities to erode the traditional protections of the Fourth Amendment by expanding the administrative search exception.** Thirty years after *Camara*, local inspectors have derived police powers by local ordinance to enter private homes which exceed the powers of law enforcement agencies.

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including the common halls, mechanical rooms and exterior of the complex. *U.S. v. Acosta*, 965 F.2d 1248 (3d Cir. 1992). Appellant agrees that inspections of common areas which are not under the exclusive control of occupants are permissible and are beneficial.

This Court took a positive step to resurrect the traditional Fourth Amendment safeguards in *Camara v. Municipal Court*. This Court is requested to take the necessary additional step to place the law abiding home occupant on no lesser footing than the criminal for Fourth Amendment protections.

## A. NO PROBABLE CAUSE EXISTED TO ISSUE THE WARRANT.

In this case, Glenolden Borough has adopted an ordinance which requires the annual inspection of all rented residences within its municipal boundary; i.e., an area-wide inspection. The *Camara* Court found that probable cause to issue a search warrant exists only where "reasonable legislative or administrative standards for conducting an area inspection **are satisfied with respect to a particular dwelling.**" *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 127, ___, 18 L.Ed.2d 930, 940-41. This Court suggested, but did not further define, "standards" that probable cause may be founded upon for issuance of an administrative search warrant.

The Third Circuit Panel misapprehended this Court's statement that, "If a valid public interest justifies the intrusion contemplated by an administrative search, there is probable cause to issue a warrant tailored to the purposes of the search." (Memorandum Opinion, p. 6; Appendix A-7). The Circuit Panel improperly substituted a "well stated public interest" for a probable cause determination based upon facts with respect to a particular dwelling. The Panel ignored this Court's stated requirement that probable cause must be founded from substantial facts with respect to the particular dwelling to be searched balanced against the reasonable goals of the inspection program.

Taking the Panel's rationale to its logical conclusion, the probable cause hearing stops after an acceptable public policy statement is offered into evidence. Search warrants founded only upon public policy statements will result in the intrusive, arbitrary and random inspections that the Fourth Amendment is designed to preclude.

This Court should understand the breadth of the Third Circuit decision. In the Third Circuit, probable cause is now a rubber stamp. Municipalities are now free to adopt any number of ordinances which require the search of the home so long as the ordinance includes a "policy statement" and "purpose language" which describes a benefit to the home occupant under the guise of health, safety, and welfare. The police state is here when governmental officials can enter the home without effective probable cause review by a disinterested magistrate and the absence of the right of the home occupant to challenge the search without being subject to criminal sanction.

In this matter, Glenolden Borough never alleged one fact particular to the residence occupied by Ms. Smith to support a probable cause determination. The Borough simply relied upon the fact that it had promulgated an ordinance which required the annual inspection of all occupied rented homes and that Ms. Smith refused access. The Application for search warrant filed by the Glenolden inspector simply provided a statement that:

(a) an ordinance permits annual inspections;
(b) The Borough conducted annual inspections of all other units in the multi-family dwelling in which Ms. Smith's apartment is located;
(c) The purpose of the inspection is to prevent sub-standard conditions;
(d) Ms. Smith refused access to the inspector.

Therefore, the District Court (the same Court that convicted her of violating the ordinance three months prior) did not have one fact to base a probable cause decision to issue a search warrant.

### B. THE FOURTH AMENDMENT REQUIRES ISSUANCE OF WARRANTS UPON TRADITIONAL PROBABLE CAUSE GROUNDS TO SEARCH OCCUPIED HOMES

A lesser standard than the traditional probable cause test should not apply to the residential occupant who objects because of the fundamental privacy interest at stake. This Court on countless occasions has held that no place is more sacred to the Fourth Amendment protection of privacy than the home. *Payton v. New York*, 445 U.S. 573 589-90 (1980). Administrative searches, such as that at issue here, are significant intrusions upon the fundamental interests protected by the Fourth Amendment. *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct. 127, ___, 18 L.Ed.2d 930, 938. Every entry into the home by a governmental entity is an affront to the personal dignity of the home occupant and is an impingement upon the occupant's feeling of self security.

This case presents the common dilemma to the occupant of a rented home in the Third Circuit. Each year, at any time during the year, the occupant is subject to the arbitrary demand for inspection simply because the calendar has advanced one year. There is no other justification or expression concerning the nature of any alleged risk to health or safety other than that another year has passed and the particular home is within the municipal boundary. The nature or condition of the building is of no concern.

In this case, the Borough has not made any legislative or administrative determination that the passage of one calendar year constitutes a threat to the safety or health of all of the occupants of rented properties from violations of the code. Absent such a finding, the Code is unconstitutional.

Less intrusive and reasonable means of accomplishing periodic inspections of property for safety and health violations exist for Glenolden Borough. The Borough would be well served by inspecting residentially rented properties on turnover in possession or upon occupant complaint. In both suggested instances, the Borough inspection would not involve the significant intrusion to an occupant's fundamental right to privacy as is currently occurring.

It is suggested to this Court that inspections based solely upon passage of time are not meaningful and do not prevent unsafe or unsanitary conditions, or even conditions of overcrowding. Those conditions are all transitory. Therefore, the annual inspection favored does not provide the minimal guarantee to provide healthy and safe conditions of the ENTIRE community.

The real motivation of localities to inspect is the fee to be earned. The inspection for fee takes little or no effort and is usually performed by a political appointee with no expertise in building construction and maintenance. In Glenolden Borough, inspector Bailey is a painter by trade and training.

## IV GLENOLDEN BOROUGH VIOLATED THE PETITIONER'S FUNDAMENTAL RIGHT TO PROCEDURAL DUE PROCESS AND RIGHT TO PRIVACY WHEN IT CRIMINALLY PROSECUTED PETITIONER BECAUSE SHE REFUSED A WARRANTLESS SEARCH OF HER HOME.

The facts of *Camara v. Municipal Court* are substantially similar to the facts of this matter and the decision of the Circuit Court of Appeals conflicts with this Court's pronouncements in said case.

The Roland Camara apartment was located in a multi-unit apartment building. The Division of Housing Inspection of the San Francisco Department of Public Health attempted to enter Roland Camara's apartment without a warrant to make a routine annual inspection for possible violations of the city's housing code. *Camara v. Municipal Court*, 387 U.S. at 526, 87 S.Ct. at ___, 18 L.Ed.2d at 934 n.1. The City Department did not have information concerning a violation of any City building or safety code violation. After three unsuccessful warrantless attempts to inspect the interior of Camara's apartment, a criminal complaint was filed against him for failing to allow the inspector access to the interior of his dwelling. The criminal sanctions could have included fines and imprisonment.

Within two days of Ms. Smith's visit to the Borough offices to procure a copy of the inspection provisions of the Borough Code, the Borough filed a criminal complaint against Ms. Smith for her failure to allow the Borough to perform a warrantless search of her home. The Criminal Complaint provided: "The acts committed by the accused were: that the Defendant did refuse and continues to refuse to allow an inspection of her rental dwelling for 1993 in violation of the Code for the Borough of

Glenolden." The criminal complaint, *Commonwealth of Pennsylvania v. Mary Smith*, was filed before the Glenolden Magistrate Court, District Justice Tozer.

On December 14, 1993, the Glenolden Magisterial District Court held a trial at which the Borough, through its solicitor, prosecuted Ms. Smith under the provisions of the Borough Code for her failing to permit a non-consensual, warrantless search of her residence.[5] After a full trial on the merits, Judge Tozer found Ms. Smith **guilty** and imposed a fine of $55.00.

### A. THE "TERMINATION" OF THE CRIMINAL APPEAL DID NOT RENDER THE CONVICTION MOOT.

If Ms. Smith failed to appeal, the conviction would have become final. However, Ms. Smith appealed the final decision of guilty to the Delaware County Court of Common Pleas.

The Court of Common Pleas scheduled a hearing on the criminal conviction for Wednesday, March 16, 1994. At the call of the list and without prior notice to Ms. Smith, Solicitor Tinucci requested the Court to "terminate" the appeal because the Borough was successful in gaining access to inspect Ms. Smith's home under a search warrant on February 24, 1994. Counsel for Ms.

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[5] Section 93-9(L) provides: Penalty for violations. Any person who violates any provision of this chapter or any provision of any rule or regulation adopted by the Borough Council pursuant to authority granted by this chapter, . . . shall, upon conviction before a District Justice, pay a penalty of not less than twenty-five dollars ($25.) nor more than three hundred dollars ($300.), and in default of payment of such fine, be imprisoned for not less than one (1) day nor more than thirty (30) days. (A. 29).

Smith objected to the Court "terminating" the appeal and informed the Court that Ms. Smith was prepared to present her case; and further, that the Pennsylvania Rules of Criminal Procedure required this Court to consider the request to "terminate" as a motion under Pennsylvania Rules of Criminal procedure 313 or 314. The Court of Common Pleas rejected Ms. Smith's objection to the "termination"; provided, however, the Court did assess court costs against the [County] Borough.

Ms. Smith suggests that the dismissal of the criminal appeal was upon a motion of nolle prosequi pursuant to Rule 313. The Rules of Criminal Procedure do not provide any other mechanism which the Borough could have relied to request a dismissal of the matter. Hence, the District Court, affirmed by the Court of Appeals, erred when it erroneously found that the criminal proceedings against Ms. Smith were "withdrawn, however, [and] the issue is now moot." (Dalzell, Memorandum Opinion, p.13 n.13).

Ms. Smith was taken further in the Criminal Court system than Roland Camara. Ms. Smith was convicted after a full trial before the District Court. She had to endure, and is still so enduring, the ridicule and derision of a municipal government that interprets its Code to require criminal prosecution first, legal process second. In comparison, Roland Camara was successful in obtaining a writ of prohibition requiring that he not be criminally prosecuted. Hence, Smith was not as fortuitous as Roland Camara; she was tried, convicted and fined.

The Third Circuit's decision would effectively permit the Borough to knock and demand entry under threat of criminal prosecution; and failing to permit entry, immediately file a criminal complaint. Therefore, Ms. Smith

was convicted in violation of the Supreme Court's decision in *Camara v. Municipal Court.*

### B. THE BOROUGH'S FAILURE TO PROVIDE MS. SMITH WITH A COPY OF THE BOROUGH CODE VIOLATED HER FUNDAMENTAL RIGHT TO DUE PROCESS OF LAW.

The Third Circuit Panel found, "that the Borough Council improperly denied Ms. Smith access to the Code. There is no reasonable justification for such action . . . The Council's response to Smith's requests, barring her access to the law, was inappropriate."

The Glenolden Code, 93-9F, provides for the right of a person found in violation of the Code to administratively appeal the officer's decision. However, when the Borough denied Ms. Smith all access to the Borough Code and the provisions for the administrative appeal, it denied Ms. Smith the fundamental right of procedural due process protected under Fifth and Fourteenth Amendments. Instead, the Borough immediately filed criminal charges against Ms. Smith and subjected her to criminal prosecution and conviction.

Compounding the wrongful denial of procedural due process, Ms. Smith was criminally convicted of violating the Borough Code. Contrary to the finding of the Circuit Panel, you can not un-convict a person. The Pennsylvania Rules of Criminal Procedure are clear – the criminal conviction on appeal can only be dismissed for failure to prosecute or by agreement of the parties. See Pa. R.Crim.P. 313 and 314. Ms. Smith did not agree to any "termination" of the appeal. Hence, the Borough proceeded, contrary to dictates of *Camara* and *Barlow's*, to use unlawful force by threatening and actually instituting criminal action to gain access to her home.

The Panel should have considered this Court's decisions and found a violation of Ms. Smith's civil rights and found error in the District Court's decision for the Borough on its Motion for Summary Judgment.

## CONCLUSION

This Court is requested to grant the Petition for writ of certiorari to address the issues of exceptional importance involving the Third Circuit Court of Appeals' rejection of this Court's pronouncements in *Marshall v. Barlow's* and *Camara v. Municipal Court*. The continuing press by local municipalities to erode the privacy rights protected under the Fourth Amendment is staggering. Thirty years after *Camara*, the home occupier derives less protection from unreasonable searches than a commercial establishment; and occupants who dare to ask "why" are being threatened with criminal prosecution.

Respectfully submitted,

LEE A. STIVALE, Esquire
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TABLE OF CONTENTS

Page

Memorandum Opinion of the Third Circuit Court of Appeals ..... A1

Judgment of the Third Circuit Court of Appeals .... A8

Judgment of the Third Circuit Court of Appeals Denying Rehearing ..... A10

Order of the U.S. District Court for the Eastern District of Pennsylvania ..... A12

Memorandum Opinion of the U.S. District Court for the Eastern District of Pennsylvania..... A14

Glenolden Borough Code, Section 93-9 ..... A33

**NOT-FOR-PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 94-2247

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MARY D. SMITH,
Appellant,

v.

BOROUGH OF GLENOLDEN OF DELAWARE COUNTY, PENNSYLVANIA; THE BOROUGH COUNCIL OF GLENOLDEN BOROUGH; GEORGE E. HASSEL; DENISE MCCARTHY; SARAH A. DOUGHERTY; JOSEPH SELFRIDGE; THEODORE BATHURST; KAREN CARLUCCI; FRANCIS O'NEILL; ALBERT KELLEY; WILLIAM REESE; EDWARD G. ROTH, III; RUSSELL H. DECKER; JAMES BAILEY, BUILDING INSPECTOR FOR THE BOROUGH OF GLENOLDEN

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 94-cv-03819)
District Judge: Honorable Stewart Dalzell

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Submitted Under Third Circuit LAR 34.1(a)
June 29, 1995

Before: HUTCHINSON*, ROTH and WEIS
*Circuit Judges*

(Memorandum Opinion filed OCT 30 1995)

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* The Honorable William D. Hutchinson participated in the oral argument and decision in the this case but died before he could join or concur in this Memorandum Opinion.

## MEMORANDUM OPINION

ROTH, *Circuit Judge:*

The plaintiff-appellant, Mary Smith, challenges certain provisions of the Glenolden Borough Housing Code. The provisions at issue allow housing inspectors to conduct annual administrative searches of rented residences. Smith argues that these searches are unconstitutional. She also claims that the warrant obtained following her refusal to consent to the search was invalid because it was not based on probable cause and allowed an unlimited search of her residence. The district court held that the Code and the inspector's conduct pursuant to the Code were constitutionally sound under the rule established in *Camara v. Municipal Court of San Francisco,* 387 U.S. 523 (1967). The district court therefore granted the Borough's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). We agree with district court's findings and affirm its decision on all grounds.

### I.

The Borough of Glenolden conducts annual inspections of all rented "dwelling units" pursuant to Chapter 93 of the Glenolden Borough Housing Code. Chapter 93 provides comprehensive regulations "to promote and protect the health, safety, morals and general welfare of the inhabitants of the Borough of Glenolden. . . . " *Glenolden Borough Code,* section 93-1.

Mary Smith rents a one-bedroom apartment in Glen Knoll Manor Apartments in Glenolden, Pennsylvania. Tenants of Glen Knoll Manor were given advance notice of the upcoming annual inspection. In a letter to the President of the Glenolden Borough Council, Smith objected to the search and promised that she would deny access to any Housing Officer sent to inspect her apartment.

Smith also requested that the Council provide her with a copy of the ordinance under which the Borough claimed authority to search her residence. However, the Borough's Solicitor provided Smith with only a small portion of Chapter 93. In response, Smith confirmed that she would not consent to the search and again asked for a complete copy of the ordinance. The Solicitor refused to provide Smith with anything further. Smith then went to the Glenolden Council offices to read the pertinent provisions of the Code. Again, the Council barred her access to the Code.

On October 18, Inspector Bailey searched apartments at Glen Knoll Manor as authorized by the Housing Code. Smith did not allow him to enter her residence. On October 28, Bailey filed a criminal complaint against Smith, charging her with refusing to allow an inspection of her home in violation of the Housing Code. Justice Tozer of the Glenolden Magisterial District Court found Smith guilty and imposed a fifty-five dollar penalty.

While Smith's appeal of her conviction was pending, Inspector Bailey sought a search warrant before Justice Tozer. Justice Tozer issued the requested warrant, authorizing Bailey to search Smith's entire residence. Having

successfully searched Smith's apartment, the Borough withdrew its criminal complaint against her, terminating her appeal.

II.

Smith argues that section 93-9(C) of the Borough's Housing Code permits non-consensual, warrantless searches of private residences. The district court acknowledged that, if Smith's interpretation was the only possible reading of section 93-9(C), the provision would be facially unconstitutional. However, when challenging the facial constitutionality of legislation, a showing that the law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [the law] wholly invalid. . . . " *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The district court held that the facts of the case presented a constitutionally sound, alternative reading of section 93-9(C). The provision could be read to prohibit inspections that are both nonconsensual and warrantless, but to allow nonconsensual searches conducted pursuant to a valid warrant. The court found that this interpretation would pass constitutional muster under the Supreme Court's decision in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967).

The district court correctly concluded that the result in this case is controlled by *Camara*. In *Camara*, the Supreme Court held that "a search of private property without consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Id.* at 528-29. In this case, although the search of Smith's apartment was

indeed nonconsensual, it was not warrantless. When Smith refused to consent to the inspection, Inspector Bailey applied for and obtained a warrant from Justice Tozer.

The district court held that, because Bailey searched Smith's residence only after obtaining a valid warrant, the nonconsensual inspection of Smith's apartment was not prohibited by the Fourth Amendment. This reading of the Code's provisions and the Borough's practice is consistent with the rule established in *Camara*. The Glenolden Borough Council conducted "a reasonable search of private property within the meaning of the Fourth Amendment." *Camara*, 387 U.S. at 538. Therefore, because a constitutional reading of the Code provisions exists, Smith's unconstitutional reading of section 93-9(C) is of little moment. *Salerno*, 481 U.S. at 745.

III.

Smith also argues that the search warrant authorizing Inspector Bailey's search of her apartment was invalid. First, she argues that the warrant was not based on probable cause to believe that an inspection of her apartment would reveal any violation of the Code. Second, she objects to the scope of the warrant, claiming that it did not limit Bailey's inspection and allowed him to search the entirety of her residence.

If a valid public interest justifies the intrusion contemplated by an administrative search, there is probable cause to issue a warrant tailored to the purposes of the search. *Camara*, 387 U.S. at 539. Chapter 93 clearly protects valid public interests. Chapter 93 of the Borough Code was enacted

> [t]o promote and protect the health, safety, morals and general welfare of the inhabitants of the Borough of Glenolden by abating overcrowded housing conditions; securing adequate lighting, heating, ventilation, access and egress; preventing or correcting unhygienic, unsanitary or unsafe conditions which might constitute a menace to the residents of the Borough of Glenolden.

*Glenolden Borough Code,* section 93-1. Inspector Bailey described the purposes of Chapter 93 on the Application for Search Warrant and Affidavit which he submitted to Justice Tozer. These purposes are furthered by annual searches of all rented dwellings.

The Supreme Court's analysis with regard to the probable cause standard in *Camara* is directly applicable here:

> Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment, *it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislation or administrative standards for conducting an area inspection are satisfied with regard to a particular dwelling.* Such standards . . . will not necessarily depend upon specific knowledge of the condition of the particular dwelling.

*Camara,* 387 U.S. at 538 (emphasis added). We conclude that the search was reasonable under the Fourth Amendment and also that the Code's administrative standards further important public goals. Therefore, the warrant issued by Justice Tozer was supported by probable cause.

We also reject Smith's claim that the scope of the warrant was unconstitutionally broad. The district court noted that the Code regulates comprehensively. It therefore held that "*Camara* permits the Borough to issue a warrant that reaches as broadly as the administrative standards in the Borough Code." *See* Brief for Appellant at App. 75. We agree. Chapter 93 of the Housing Code regulates all aspects of apartment safety and therefore justifies a search of Smith's entire residence. The scope of the warrant at issue was not overbroad.

III.

We will affirm the District Court's opinion granting summary judgment in favor of the Borough of Glenolden. We add, however, that the Borough Council improperly denied Smith access to the text of the Code. There is no reasonable justification for such action. Following her initial request, Smith should have been provided with a full text of Chapter 93. The Council's response to Smith's requests, barring her access to the law, was inappropriate.

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TO THE CLERK:

Please file the foregoing Memorandum Opinion.

By the Court,

/s/ Jane R. Roth
Circuit Judge

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 94-2247

---

MARY D. SMITH,
Appellant,

v.

BOROUGH OF GLENOLDEN OF DELAWARE COUNTY, PENNSYLVANIA; THE BOROUGH COUNCIL OF GLENOLDEN BOROUGH; GEORGE E. HASSEL; DENISE MCCARTHY; SARAH A. DOUGHERTY; JOSEPH SELFRIDGE; THEODORE BATHURST; KAREN CARLUCCI; FRANCIS O'NEILL; ALBERT KELLEY; WILLIAM REESE; EDWARD G. ROTH, III; RUSSELL H. DECKER; JAMES BAILEY, BUILDING INSPECTOR FOR THE BOROUGH OF GLENOLDEN

---

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 94-cv-03819)
District Judge: Honorable Stewart Dalzell

---

Submitted Under Third Circuit LAR 34.1(a)
June 29, 1995

Before: HUTCHINSON*, ROTH and WEIS
*Circuit Judges*

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* The Honorable William D. Hutchinson participated in the oral argument and decision in this case but died before he could join or concur in this Judgment Order.

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a)] on June 29, 1995

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the district court dated November 30, 1994 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/ Jane R. Roth
Clerk

Dated: OCT 30 1995

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 94-2247

---

MARY D. SMITH,

Appellant,

v.

BOROUGH OF GLENOLDEN OF DELAWARE COUNTY, PENNSYLVANIA THE BOROUGH COUNCIL OF GLENOLDEN BOROUGH; GEORGE E. HASSEL; DENISE MCCARTHY; SARAH A. DOUGHERTY; JOSEPH SELFRIDGE; THEODORE BATHURST; KAREN CARLUCCI; FRANCIS O'NEILL; ALBERT KELLEY; WILLIAM REESE; EDWARD G. ROTH, III; RUSSELL H. DECKER; JAMES BAILEY, BUILDING INSPECTOR FOR THE BOROUGH OF GLENOLDEN

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BEFORE; SLOVITER, *Chief Judge*, BECKER, STAPLETON MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, SAROKIN, and WEIS *Circuit Judges*

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SUR PETITION FOR REHEARING IN BANC

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

/s/ Jane R. Roth
Circuit Judge

Dated: DEC 05 1995

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| **MARY D. SMITH** | : | **CIVIL ACTION** |
| **v.** | : | |
| **BOROUGH OF GLENOLDEN OF DELAWARE COUNTY, PENNSYLVANIA, the BOROUGH COUNCIL OF GLENOLDEN BOROUGH, GEORGE E. HASSEL, DENISE McCARTHY, SARAH A. DOUGHERTY, JOSEPH SELFRIDGE, THEODORE BATHURST, KAREN CARLUCCI, FRANCIS O'NEILL, ALBERT KELLEY, WILLIAM REESE, EDWARD G. ROTH, III, and RUSSELL H. DECKER, and JAMES BAILEY, BUILDING INSPECTOR FOR THE BOROUGH OF GLENOLDEN** | : | **NO. 94-3819** |

**ORDER**

**AND NOW,** this 30th day of November, 1994, upon consideration of plaintiff's and defendants' cross-motions for summary judgment, including the joint stipulation of facts and exhibits, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. Plaintiff's motion for summary judgment is DENIED;

2. Defendants' motion for summary judgment is GRANTED;

3. JUDGMENT IS ENTERED in favor of defendants and against plaintiff on all of plaintiff's claims under the United States Constitution;

4. Plaintiffs' claims under the Constitution and laws of the Commonwealth of Pennsylvania are DISMISSED WITHOUT PREJUDICE;

5. Paragraph 5 of this Court's Order dated September 14, 1994 is VACATED; and

6. The Clerk SHALL CLOSE this case statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.
Stewart Dalzell, J.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|---|
| MARY D. SMITH | : | CIVIL ACTION |
| v. | : | |
| BOROUGH OF GLENOLDEN OF DELAWARE COUNTY, PENNSYLVANIA, the BOROUGH COUNCIL OF GLENOLDEN BOROUGH, GEORGE E. HASSEL, DENISE McCARTHY, SARAH A. DOUGHERTY, JOSEPH SELFRIDGE, THEODORE BATHURST, KAREN CARLUCCI, FRANCIS O'NEILL, ALBERT KELLEY, WILLIAM REESE, EDWARD G. ROTH, III, and RUSSELL H. DECKER, and JAMES BAILEY, BUILDING INSPECTOR FOR THE BOROUGH OF GLENOLDEN | : | (Filed Nov. 30, 1994)<br><br>NO. 94-3819 |

**MEMORANDUM**

Dalzell, J. November 30, 1994

I. Introduction

Chapter 93 of the Municipal Code of the Borough of Glenolden ("Chapter 93" or the "Borough Code") requires annual inspections of all private residential apartments. Plaintiff, Mary D. Smith, rents an apartment

in the Borough of Glenolden, Pennsylvania (the "Borough" or "Glenolden"). She raises two Fourth Amendment challenges in her complaint.[1] First, she argues that the Fourth Amendment prohibits the Borough's annual housing inspections. Second, she has challenged a search warrant pursuant to which James Bailey, the Borough Building Inspector, ultimately inspected her apartment.

Smith filed her complaint on June 20, 1994 and named as defendants the Borough, the members of the Borough Council, and James Bailey, the Borough's Building Inspector. In Count I, Smith asks us to declare that the annual inspections violate the "Pennsylvania and Federal constitutional guarantees of Privacy, and the Right to be free from unlawful searches" (Complaint ¶ 57). In Count II, Smith seeks an Order permanently enjoining the Borough from conducting annual inspections. Finally, in Count III, Smith seeks damages and other relief for the

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[1] Read broadly, Smith's expansive Complaint alleges Fourth Amendment violations as well as violations of procedural due process (Complaint ¶¶ 23-33, 66), substantive due process (Complaint ¶ 57), and equal protection (Complaint ¶¶ 68-69). In addition, Smith has challenged defendants' conduct under the Constitution and laws of Pennsylvania (Complaint ¶¶ 1, 57, 64, 70). In her Motion for Summary Judgment, however, Smith has narrowed her challenge to three discrete arguments. First, she argues that the Borough Code violates the Fourth Amendment because it contemplates warrantless searches of apartments without unit occupants' consent. Second, Smith challenges the search warrant pursuant to which James Bailey inspected her apartment as a violation of the Fourth Amendment. Finally, she argues that the Borough violated state law when it refused to give her complete copies of Chapter 93.

alleged constitutional violations of the Council and Building Inspector.[2]

We held a scheduling conference in Chambers on September 14, 1994. At the conference, the parties agreed that the facts are undisputed and that the issues that divide them are legal. Thus, we directed the parties to file a joint stipulation of facts and exhibits, and set a briefing schedule for cross-motions for summary judgment.[3]

The relevant facts are straightforward enough. Smith has rented her one-bedroom apartment in the Glen Knoll Manor Apartments in Glenolden since November, 1977 (Stipulation ¶ 1; Complaint ¶ 9 and Exhibit A). Glen Knoll Manor is a three building complex consisting of one hundred and seventy-four dwelling units (Stipulation ¶ 2). Pursuant to the Borough Code (Stipulation Exhibit A), Bailey scheduled the annual inspection of the complex on October 18, 1993 (Stipulation ¶ 9), and the owner of Glen Knoll Manor sent a notice to each unit advising the occupants of the inspection (Stipulation ¶ 9 and Exhibit B). Smith objected to the inspection in a letter to the Borough President dated October 12, 1993 (Stipulation ¶ 10 and Exhibit C).[4] On October 18, Bailey

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[2] We have jurisdiction over Smith's federal constitutional claims pursuant to 28 U.S.C. § 1331. We also have jurisdiction over Smith's claims under the Pennsylvania Constitution and laws pursuant to 28 U.S.C. § 1367(a).

[3] In our scheduling Order, we also directed that no representative of the Borough enter Smith's apartment until further Order of the Court. Thus, we denied as moot Smith's application for a preliminary injunction.

[4] The Borough responded to the letter through counsel on October 15, 1993, and Smith and the Borough exchanged at least one more round of letters by the end of that month (Stipulation

requested entry into Smith's apartment, and Smith refused (Stipulation ¶ 12).[5]

On February 15, 1994, Bailey procured a search warrant to inspect Smith's apartment from Justice Tozer of the Magisterial District Court (Stipulation ¶¶ 21-22 and Exhibit H); by agreement of Smith's counsel and counsel for the Borough, the warrant was not executed. Justice Tozer issued a second warrant on February 24, 1994. Bailey entered Smith's apartment and inspected it on that day (Stipulation ¶¶ 24-25 and Exhibit I).

We shall here consider only Smith's challenges under the United States Constitution. We hold that defendants have not violated the United States Constitution, and shall enter judgment in their favor on Smith's federal claims. We shall dismiss Smith's claims to the extent that they assert claims under state statutory and constitutional law so that Smith may assert them in a state forum of proper jurisdiction.

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¶¶ 11, 13, 14, and Exhibits D, E, and F). The letters reveal a dispute between Smith and the Borough over the extent of Smith's right of access to the Borough Code, and thus are not relevant to Smith's federal constitutional claims.

[5] The Borough also instituted criminal proceedings against Smith for her refusal to comply with the Housing Code (Stipulation ¶ 16). The Magisterial District Court held a hearing, found Smith guilty of violating the Code, and fined her $55.00 (Stipulation ¶¶ 16-18). Smith appealed to the Court of Common Pleas (Stipulation ¶ 19), but the Borough withdrew the criminal action after Bailey completed Smith's inspection on February 24, 1994 (Stipulation ¶ 26).

## II. Legal Analysis

Since the parties have stipulated to the relevant facts, this dispute is particularly appropriate for treatment under Federal Rule of Civil Procedure 56(c). The presence of cross-motions does not make this field less fertile for such treatment. *See Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir. 1968) ("Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment . . . ").

We turn to consider Smith's federal claims.

### A. Smith's Fourth Amendment Challenges

Smith argues that Chapter 93 of the Borough Code permits warrantless inspections of private residences without the consent of the occupant of the residence, in violation of the Fourth Amendment. *See* Plaintiff's *Motion for Summary Judgment* at 2-4. Smith also challenges the warrant by which Bailey ultimately entered her apartment. She argues that (1) the warrant that authorized Bailey to enter her apartment was not based upon probable cause to believe that the apartment was in violation of the Code; and (2) the warrant did not limit the scope of Bailey's inspection of the apartment. *Id.* at 6.

Both parties agree that the principles announced in *Camara v. Municipal Court*, 387 U.S. 523 (1967), control the Fourth Amendment issues in this case. *Camara* sought to resolve the tension between the rigid text of the Fourth

Amendment[6] and the difficulties of preventing the deterioration of urban housing. *Id.* at 525. The text of the Fourth Amendment surely would govern the "right of officers to thrust themselves into a home." *Id.* at 529 (quoting *Johnson v. United States*, 333 U.S. 10, 13 (1948)). Moreover, unannounced, warrantless inspections would violate the "one governing principle . . . consistently . . . followed" in Fourth Amendment cases:

> [E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.

*Id.* at 528-29 (citing cases). Yet the Supreme Court in *Camara* also recognized the "intensive efforts at all levels of government to contain and eliminate urban blight" through the periodic, mandatory inspection of private property. *Id.* at 525. If these inspections could only take place upon the belief that a violation of a housing code had already occurred or was imminent, then the purpose of the inspection – *avoiding* the violations – would be thwarted. *Id.* at 535-36. The Court credited the substantial agreement among scholars that "the only effective way to seek universal compliance with the minimum standards

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[6] The Fourth Amendment affirms that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV.

required by municipal codes is through routine periodic inspections of all structures." *Id.*[7]

*Camara* resolved this textual and practical tension by remaining faithful to the Fourth Amendment's prohibition of warrantless searches of dwellings yet altering the definition of "probable cause" to accommodate the need for housing inspections. First, the Court held that such inspections "when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual" and are therefore invalid. *Id.* at 534. Thus, after *Camara*, a state must obtain a warrant to inspect private property if the occupant does not consent to the search. Second, *Camara* altered the definition of "probable cause" in the context of routine non-criminal housing inspections conducted pursuant to a regulatory scheme. The Court held that " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for

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[7] To this extent there was no dispute between *Camara's* majority and the majority in *Frank v. State of Maryland*, 359 U.S. 360 (1959), which *Camara* overruled. As Justice Frankfurter described this consensus in *Frank*:

> Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health. . . . The need for preventive action is great, and city after city has seen this need and granted the power of inspection to its health officials; and these inspections are apparently welcomed by all but an insignificant few.

*Id.* at 372. Justices Harlan, Stewart and Clark, who dissented in *Camara*, specifically embraced Justice Frankfurter's language on the point, *see Camara*, 387 U.S. at 546-47.

conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* at 538. Thus, in housing inspections and other administrative searches, probable cause is met by finding a reasonable relationship between the "legislative or administrative standards" (here, the Borough Code) and the dwelling to be searched (here, Smith's apartment).[8]

The Court arrived at its definition of "probable cause" by "balancing the need to search against the invasion which the search entails." *Id.* at 536-37. The Court identified three reasons that justified diminished protection for housing inspections: (1) the long history of judicial and legislative acceptance of housing inspection programs; (2) the public interest in preventing and abating dangerous conditions that may not be apparent without a close inspection of the residence (*e.g.*, faulty wiring); and (3) the impersonal nature of the investigation. *Id.* The Court has continued to adhere to the *Camara* framework in later cases. *See, e.g., Marshall v. Barlow's Inc.*, 436 U.S. 307, 325 (1978).[9]

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[8] In a later opinion, the Court identified this balancing as a reasonableness inquiry. *See Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4 (1987) ("In the administrative search context, we formally require that administrative warrants be supported by 'probable cause,' because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness.") (dictum).

[9] Third Circuit precedent is consistent with this analysis. *See, e.g., Martin v. Int'l Matex Tank Terminals– Bayonne*, 928 F.2d 614, 622 (3d Cir. 1991) (holding that either reasonable legislative or administrative standards or evidence of existing violations establishes probable cause for an OSHA warrant) (citing cases).

With these principles in mind, we now turn to the Borough Code and the search warrant.

1. Constitutionality of the Borough Code.

Chapter 93 of the Borough Code, adopted in 1974, provides for the comprehensive regulation of all aspects of property ownership and residential life in Glenolden rental apartments. Property owners face an array of regulations concerning plumbing, heating, and electrical facilities (section 93-4), light and ventilation (section 93-5), property maintenance (including regulation of grading, drainage, noxious weeds, accessory structures, junked motor vehicles, structural safety, windows and doors, dampness, and floors) (section 93-6), building maintenance (including regulation of foundations, skylights, stairways, porches, balconies, and storage rooms) (section 93-7), and extermination, window screens, and sidewalks (section 93-8). The Borough also imposes burdens on the occupants of individual "dwelling unit[s]"[10] regarding maintenance of the unit, and disposal of trash and other waste (section 93-8).

The Borough Council enacted Chapter 93 in order:

> [T]o promote and protect the health, safety, morals and general welfare of the inhabitants of the Borough of Glenolden by abating overcrowded housing conditions; securing adequate

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[10] A "dwelling unit" is "[a]ny room or group of rooms located in a multiple dwelling and forming a single habitable unit with facilities which are used or intended to be used for living, sleeping, cooking and eating." Section 93-3.

> lighting, heating, ventilation, access and egress; [and] preventing or correcting unhygienic, unsanitary or unsafe conditions which might constitute a menace to residents of the Borough of Glenolden.

Section 93-1. The purpose of the Borough Code is consistent with the reasoning of *Camara*. The Borough seeks not only to "abat[e]" and "correct[ ]" poor conditions that already exist; it also seeks to "prevent[]" poor conditions from developing at all. *Cf. Camara*, 387 U.S. at 536-37. The beneficiaries of the regulatory scheme are the individual unit occupants, such as Smith. Moreover, the Borough Code establishes clear directives – indeed, the regulations for the most part establish objectively ascertainable mandates rather than discretionary standards such as "adequate" or "in good working condition". Finally, all the provisions of the Borough Code relate to the broad purposes established in section 93-1. The Borough Code is thus a palpably reasonable means of dealing with the potential urban problems envisioned in section 93-1.

The Borough also enacted enforcement provisions "to determine compliance with and enforce the provisions of" Chapter 93. Section 93-9 (Introduction). Section 93-9(A)(1)(a) establishes that all owners of apartment complexes must obtain annual certificates of occupancy for each unit. Before the Housing Officer[11] issues the

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[11] The Housing Officer is "[t]he official of the Borough of Glenolden designated by the Borough Council to assist in the enforcement of this chapter." Section 93-3. The parties have stipulated that James Bailey, the Building Inspector, is the current Housing Officer (Stipulation ¶ 6).

certificate of occupancy, he must inspect the unit pursuant to Section 93-9(C), which states:

> The Housing Officer or his agents are hereby authorized and directed to make inspections of the conditions of rental dwellings, multiple dwelling units, rooming units and other structures located in the Borough of Glenolden. *Upon display of proper identification, the inspector is authorized to enter, examine and survey such units and premises on weekdays between 9:00 a.m. and 4:00 p.m. or at such other time as may be . . . mutually agreed upon by the occupant and the Housing Officer or one of his agents.*

Section 93-9(C) (emphasis added).

We cannot say that this enforcement scheme is unconstitutional on its face. We may find a statute to be facially unconstitutional only if every possible interpretation of the statute would be unconstitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-97 (1984). *Cf. Planned Parenthood of Southeast Pennsylvania v. Casey*, 822 F. Supp. 227, 235 (E. D. Pa. 1993), *rev'd on other grounds*, 14 F.3d 848 (3d. Cir. 1994).[12]

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[12] In *Casey*, our Court of Appeals recognized that the Supreme Court "has . . . set a new standard for facial challenges to previability abortion laws." *Casey*, 14 F. 3d at 863 n.21. This new standard, however, does not affect the "old rule", *i.e.*, that a plaintiff must prove "that 'no set of circumstances exists under which [a statute] would be valid.' " *Id.* (quoting *Salerno*, 481 U.S. at 745).

We do agree with Smith that certain interpretations of section 93-9(C) would be unconstitutional. For example, section 93-9(C) does not explicitly require an unit occupant's consent for an inspection, nor does it contemplate a warrant procedure if a unit occupant does in fact refuse consent. If we interpreted section 93-9(C) to permit warrantless searches without the occupant's consent, then it would be clearly unconstitutional under *Camara.*

Yet facial challenges impose a "heavy burden", because "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. . . . " *Salerno,* 481 U. S. at 745. Not only do the facts of this case present an alternative – and constitutional – interpretation of the Borough Code, but the language of the Borough Code itself can be interpreted to create a constitutionally viable inspection program. *Cf. Cheek v. United States,* 111 S. Ct. 604, 611 (1991) ("It is common ground that this Court, where possible, interprets Congressional enactments so as to avoid serious constitutional questions.") (citing cases).

The facts here suggest that the Borough follows the mandate of *Camara* in its apartment inspections. Smith refused to allow Bailey to enter her apartment when Bailey arrived to conduct the investigation (Stipulation ¶ 12). Bailey then applied to the Magisterial District Court and obtained a warrant (Stipulation ¶ 21). He conducted the inspection only after he received the warrant (Stipulation ¶¶ 24-25).

Similarly, all the residents of Smith's complex received advance notice of the impending inspections.

The notice that the complex owner sent to the unit tenants contemplated that occupants might refuse to allow access to Bailey (Stipulation ¶ 9 and Exhibit B). In the notice, a representative of the owner of the complex told the tenants:

> Please be advised that the Building Inspector- . . . will be doing [his] yearly inspection on Monday, October 18, 1993. Should you wish to be home, we will be starting the inspection around 10:00 a.m. *If you will not be home, anyone having a top lock, please leave it off so that we can gain access to your unit.* . . .

Thus, those tenants with top locks could refuse access merely by securing the top lock.

We also presume that the Housing Officer would respect the wishes of those who formally object in advance to the inspection. Here, for example, Smith had sent a letter to the Borough President on October 15 as a "formal notice that access to [her] residence [would] be denied" (Stipulation Exhibit C). The record shows that Bailey then sought to enter the apartment on October 18 only with Smith's consent. Even according to Smith, Bailey "knocked on [Smith's] door[,] . . . identified himself[,] and requested access" (Stipulation Exhibit E). When Smith refused to allow Bailey to enter, he sought a search warrant.[13]

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[13] The Borough also instituted criminal proceedings against Smith for her refusal to allow entry into her unit (Stipulation ¶ 16). These proceedings were withdrawn, however (Stipulation ¶ 26), and the issue is now moot. *See* note 5, *supra*. Thus, we need not decide the constitutional questions that would arise if

Moreover, the language of the Borough Code clearly contemplates advance notice to the occupant before the inspection. Because the Housing Officer must "display" his identification to the occupant before the inspection occurs, the occupant will always have advance notice of the inspection, even in the absence of a written notice from the owners, such as the notice that Smith received. Thus, the tenant may refuse to allow the Housing Officer to enter the apartment after he displays his identification. If the occupant refuses entry, the Housing Officer may then seek a search warrant to enter the apartment. This interpretation of the Borough Code is entirely consistent with what in fact happened here.[14]

2. Constitutionality of the Search Warrant.

Smith also challenges the validity of the warrant pursuant to which Bailey inspected her apartment. Specifically, she argues that Justice Tozer issued the search warrant without probable cause and without any limitation as to the area subject to the search (Complaint ¶¶ 44-48), and included a search of Smith herself in the warrant.

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the Borough had not withdrawn the criminal action against Smith. We do note that such a proceeding would likely conflict with the holding of *Camara* and *its companion case, See v. City of Seattle,* 387 U.S. 541, 545-46 (1967).

[14] It will be recalled that the Borough Code also limits the time of inspection to weekdays between 9:00 a.m. and 4:00 p.m., or upon the "mutual[] agree[ment]" of the Housing Officer and the unit occupant.

*Camara* established that the probable cause to conduct a housing inspection would depend upon the "reasonable legislative or administrative standards" underlying the inspection. *Camara*, 387 U.S. at 538. The Court specifically instructed:

> Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e.g.*, a multi-family apartment house), or the condition of the entire area, *but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.*

*Id.* at 538 (emphasis added). Thus, the Borough need not have specific knowledge concerning the particular condition of Smith's apartment. As long as the Borough's Housing Code is reasonable (as we have concluded it is), then the search warrant is valid if the scope of the search relates to the administrative scheme that the Borough Code establishes.

The two documents relevant to the inquiry into the validity of the search warrant are the Application for Search Warrant and Affidavit (the "Application and Affidavit"), and the Search Warrant itself (Stipulation Exhibit I). Both documents appear to be standard forms used for civil and criminal searches. Bailey completed the Application and Affidavit (Stipulation ¶ 24). In that document he identified only Smith's apartment as the "item[] to be searched". He repeated Smith's address as the "premises . . . to be searched". Bailey based his belief that probable cause existed for the inspection by describing

the Housing Code and its purpose.[15] The Search Warrant appears to be printed on the back of the Application and Affidavit, and merely authorizes Bailey to "search the premises . . . described on the reverse side".

We conclude that the Borough remained within constitutional limitations when it sought, received, and executed the search warrant. *Camara* does not require that Bailey have specific knowledge of a potential violation in Smith's unit – indeed, Bailey could lawfully obtain a warrant even if he knew that Smith's apartment was *not* in violation of the Borough Code. All he needed to show to the issuing Justice was the existence and purpose of the administrative scheme and the relationship between that scheme and Smith's unit. *See Camara*, 387 U.S. at 538.

Moreover, *Camara* permits the Borough to issue a warrant that reaches as broadly as the administrative

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[15] Bailey described his probable cause belief (Stipulation Exhibit I):

> The Borough of Glenolden has an Ordinance which requires an annual inspection of all apartment dwelling units. The Borough has conducted the annual inspections of every other unit in the multi-family apartment complex other than the unit specified. Despite requests [f]or access, the inspections have been refused by the occupant of this particular rental unit.
>
> The purpose of the inspection is to prevent sub-standard conditions and assure a safe and sanitary environment in compliance with the local codes for the protection of the occupaants [*sic*] of the unit in question as well as the health, safety and welfare of the adjacent occupants and the occupants of the complex. Date of last inspection March 9, 1992[.]

standards in the Borough Code. As we have described above, the Glenolden Housing Code is a comprehensive set of regulations governing every aspect of individual apartments. Thus, the warrant could grant the Housing Officer permission to search the entire apartment.[16]

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[16] In her complaint, Smith alleges that "[u]pon information and belief, Inspector Bailey in an attempt to harass and inconvenience the Plaintiff exceeded the stated scope of the administrative inspection and inspected all rooms and areas of the Plaintiff's Apartment" (Complaint ¶ 67; *see also* Complaint ¶¶ 68-69). This paragraph of the Complaint raises questions of both the purpose and scope of the inspection. Bailey, however, has submitted an affidavit to the Court in which he avers that he entered the apartment only for the purposes established by the Housing Code. Exhibit B to *Defendants' Response to Plaintiff's Motion for Summary Judgment*. Plaintiff has not produced evidence to the contrary. Moreover, it is difficult to imagine how Bailey could have exceeded the scope of the warrant, since the warrant allowed him to search the entire apartment.

Smith has also attacked the warrant by averring that it allowed Bailey to search not only her apartment, but also her person (Complaint ¶ 16; *Memorandum in Support of Plaintiff's Motion for Summary Judgment* at 4). Smith has misread the document. As noted above, it appears that the Search Warrant is printed on the reverse side of the Application for Search Warrant and Affidavit. On the Application, in the box labelled "Specific Description of Premises and/or Persons to be Searched", Bailey wrote Smith's address, "B-311[.] 99 E. Glenolden Avenue, Glenolden, Pa.". The Search Warrant authorizes Bailey to "search the premises *or* person (described on the reverse side)", *i.e.*, in the Application Stipulation Exhibit I (emphasis added)). The warrant, therefore, did not authorize the search of Smith's person, because Bailey "described" only the apartment (and not Smith herself) as subject to the search in the Application and Affidavit. Finally, it does not appear from the record that Bailey did in fact search Smith's person when he inspected her apartment.

B. Other Federal Constitutional and State-law Challenges

We have examined Smith's other federal constitutional challenges[17] and find them to be without merit because they are either reiterations of, or merge into, her Fourth Amendment claims.[18] Thus, we will enter Judgment in favor of defendants on these challenges. To the extent that Smith has alleged violations of Pennsylvania constitutional and statutory law, we decline to consider them, pursuant to 28 U.S.C. § 1367(c). Rather, we shall dismiss these claims without prejudice so that Smith may, if she chooses, assert them in a state forum of competent jurisdiction.[19]

III. Conclusion

As detailed above, the Borough Code protects the tenants of Glenolden from a wide variety of perils, many of them not visible without close inspection. The record shows that the defendants observed *Camara*'s requirements from October, 1993 to March, 1994 in its effort to

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[17] *See* note 1, *supra*.

[18] For example, Smith's averments of "violations of privacy" (Complaint ¶ 57) merely complain about the annual inspections and the search in question the only possible federal claim not rooted in the Fourth Amendment is Smith's equal protection assertion (Complaint ¶¶ 68-69), which fails for want of a scintilla of evidence of unlawful disparate treatment.

[19] Because we have found no constitutional violations, we also decline to address defendants' claims of immunity. *See Defendants' Motion for Summary Judgment, Memorandum of Law in Support of*, unnumbered document, at seventh through tenth pages.

benefit Smith and her neighbors. The United States Constitution does not give Smith the power to veto her neighbors' safety, which the Borough sought to assure by its lawful enforcement of this reasonable Code. We therefore conclude that Smith's federal constitutional arguments must fail.

An appropriate Order follows.

**§ 93-9. Administration and enforcement.**

The Borough Council of the Borough of Glenolden shall appoint a Housing Officer and such deputies and assistants as are necessary to enforce the provisions of this chapter. Such positions may be combined with another position or positions established in the borough. In order to determine compliance with and enforce the provisions of this chapter, the following shall apply:

A. Issuance of certificates of occupancy. [Amended 12-28-78 by Ord. No. 823, approved 12-28-78; 5-12-88 by Ord. No. 931, approved 5-12-88]

(1) No person, firm or corporation owning, managing, conducting or operating a dwelling unit shall rent, lease, let out or permit the same to be occupied or shall rerent the same without first securing the following:

(a) An annual certificate of occupancy for each occupied dwelling unit issued pursuant to the provisions of this chapter and other applicable ordinances and rules and regulations enacted by the Borough Council.[1]

(b) In addition to the foregoing, a certificate of occupancy for every vacant dwelling unit issued pursuant to the provisions of this chapter and other applicable ordinances and rules and regulations enacted by the Borough Council prior to its occupancy.

(2) [Amended 2-14-1991 by Ord. No. 964, approved 2-14-1991] The Housing Officer

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[1] Editor's Note: See also § 162-68, Certificates of occupancy.

and/or his agent or agents are hereby authorized and directed to process all applications for certificates of occupancy and, prior to the issuance of the same, to determine that all of the requirements of this chapter and/or of any other applicable ordinances and rules and regulations enacted by the Borough Council have been met. The fee for the issuance of any certificate of occupancy shall be as follows:

(a) If only one (1) inspection is required prior to issuance, the fee shall be fifty dollars ($50.).

(b) If more than one (1) inspection is required prior to issuance, the fee in Subsection A(2)(a) above shall be increased by the sum of twenty-five dollars ($25.) for each additional inspection after the first inspection.

(3) The fee for the first inspection shall be filed with the application for the certificate of occupancy, and any additional fees for additional inspections shall be paid prior to the issuance of the certificate of occupancy.

B. The owner and the operator of any dwelling unit which has been rented, leased or let out or rerented during any calendar year shall, on or before February 15 of the following year, file a list with the Housing Officer setting forth the number of units occupied as of December 31 of the reporting year and the names of the tenants thereof.

C. Inspection and access to dwellings. The Housing Officer or his agents are hereby authorized and directed to make inspections of the conditions of

rental dwellings, multiple dwelling units, rooming units and other structures located in the Borough of Glenolden. Upon display of proper identification, the inspector is authorized to enter, examine and survey such units and premises on weekdays between 9:00 a.m. and 4:00 p.m. or at such other time as may be necessary in an emergency or as mutually agreed upon by the occupant and the Housing Officer or one of his agents.

D. Access for repairs. Every occupant of a rental dwelling unit or rooming unit shall grant to the owner or his agents or employees free access to it at reasonable times for the purpose of making repairs or alterations to effect compliance with this chapter.

E. Notice of violation.

(1) When the Housing Officer determines that there exists a violation of any provision of this chapter, he shall serve written notice of such violation on the person or persons responsible therefor, as hereinafter provided:

(2) Such notice shall:

(a) Be put in writing.

(b) Include a statement of the reasons why it is being issued.

(c) Allow a reasonable time for the performance of any act it requires.

(d) Be served upon the owner or his agent or upon the occupant, as the case may require; provided that such notice shall be deemed to be properly served upon

such person if a copy thereof is sent by registered or certified mail to his last known address, or if he is served by any other method authorized or required under the laws of this state.

(3) Such notice may contain an outline of remedial action which, if taken, will effect compliance with the provisions of this chapter and with rules and regulations adopted pursuant thereto.

F. Appeals from notice of violation. Any person affected by any notice which has been issued in connection with the enforcement of any provisions of this chapter or of any rule or regulation adopted pursuant thereto may request and shall be granted a hearing on the matter before the Borough Council of Glenolden or a committee appointed by the Borough Council, provided that such person shall file in the office of the Housing Officer a written petition requesting such hearing and setting forth a brief statement of the grounds therefor within seven (7) days after the day the notice was served. Upon receipt of such petition the Borough Council or its appointed committee shall set a time and place for such hearing and shall give petitioner written notice thereof. At such hearing the petitioner shall be given an opportunity to be heard and to show why such notice should be modified or withdrawn. The hearing shall be commenced not later than seven (7) days after the day on which the petition was filed. After the hearing the Borough Council or its appointed committee may sustain, modify or withdraw the notice of the violation on the basis of the findings at the hearing and shall give

petitioner written notice thereof. Such proceedings shall be summarized in writing and shall become a matter of public record in the office of the Housing Officer. Such record shall also include a copy of every notice or order issued in connection with the matter. If the appointed committee hears the petitioner and makes a decision which the petitioner rejects, the petitioner shall have the right to appeal to the entire Borough Council within seven (7) days of receiving the notice, asking the entire Borough Council to hear the case and make the ruling. Any person aggrieved by the decision of the Borough Council may seek relief therefrom in any court of competent jurisdiction, as provided by the laws of this state.

G. Effective date of notice of violation. Any notice served pursuant to Subsection E shall automatically become an order if a written petition is not filed in the office of the Housing Officer within seven (7) days after such notice is filed.

H. Emergency action. Whenever the Housing Officer finds that there exists any violation of this chapter which creates an emergency requiring immediate correction to protect the health or safety of any occupant of a rental dwelling or the public, he may issue an order reciting the existence of such an emergency and requiring that such action be taken as he deems necessary to meet the emergency. Notwithstanding the other provisions of this chapter, such order shall be effective immediately. Any person to whom such order is directed shall comply therewith immediately, but upon petition to the Borough Council shall be afforded a hearing as soon as possible. After such hearing, depending upon the findings of the

Council as to whether the provisions of this chapter and of the rules and regulations adopted pursuant thereto have been complied with, the Housing Officer shall continue such order in effect, or modify it or revoke it.

I. Dwelling units unfit for human habitation. Whenever the Housing Officer finds that a rental dwelling unit constitutes a serious hazard to the health or safety of the occupants or to the public because it is dilapidated, unsanitary, vermin-infested, rodent-infested or lacking in basic facilities and equipment required by this chapter, he shall designate such dwelling unit as unfit for human habitation. Such designation shall be posted on the dwelling and shall specify the reason for such a finding. A notice of violation shall also be served in accordance with the provisions of Subsection E. Any dwelling unit so designated shall be vacated within a reasonable time as specified by the Housing Officer and shall not again be used for human habitation until the hazard or violation has been eliminated or corrected and the Housing Officer has removed the designation and given written approval for occupancy. A report of any such closings must immediately be filed with the Borough Council.

J. Adoption of rules and regulations. The Borough Council is authorized to make and adopt such procedural rules as it may deem necessary for the proper enforcement of this chapter; provided that such procedural rules and regulations shall not be in conflict with the substantive provisions of this chapter. Such rules and regulations shall have the same force and effect as the provisions of this chapter, and the penalty for violation

thereof shall be the same as the penalty for violation of the provisions of this chapter.

K. Abatement of violations. If a violation has not been corrected within the time designated for such compliance and the Borough Council finds that the continuation of such violation constitutes a public nuisance or hazard, it may order the correction of such violation, using borough funds or borough personnel to accomplish such corrections, and may charge the cost thereof to the violator. It may collect such cost by lien and/or otherwise as may be authorized by the laws of this state.

L. Penalty for violations. Any person who violates any provision of this chapter or any provision of any rule or regulation adopted by the Borough Council pursuant to authority granted by this chapter, or fails to correct within a reasonable time the defects for which the dwelling or dwellings have been cited, shall, upon conviction before a District Justice, pay a penalty of not less than twenty-five dollars ($25.) nor more than three hundred dollars ($300.), and in default of payment of such fine, be imprisoned for not less than one (1) day nor more than thirty (30) days.[2]

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[2] Editor's Note: Amended at time of adoption of Code; see Ch. 1, General Provisions, Art. I.